STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B088

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LINDA CAGE,

Complainant,

vs.

DEPARTMENT OF REVENUE,
COLORADO LOTTERY

Respondent.

This hearing came before Administrative Law Judge Mary S. McClatchey on March 30, 2000. Complainant appeared pro se. Respondent was represented by Cristina Valencia, Assistant Attorney General, Office of the Colorado Attorney General.

PRELIMINARY MATTERS

Witnesses.

Complainant Linda Cage (ÄComplainant≅) called the following witnesses: herself and Frederick L. Cage, her husband.

Exhibits.

Complainant=s Exhibits A, B, C, D, E, and G were admitted by stipulation. Complainant=s Exhibit F was offered but not admitted.

Respondent=s Exhibits 1 - 5 were admitted by stipulation.

MATTER APPEALED

Complainant appeals her administrative termination after having exhausted all

available leave, claiming she was entitled to 22 months of disability leave prior to termination. For the reasons set for below, respondent=s action is affirmed.

ISSUES

1. Whether the actions of the Respondent were arbitrary, capricious, or contrary to rule or law.

PRELIMINARY MATTERS

Complainant presented her case first, since she bore the burden of proof on the administrative termination claim. After Complainant rested, Respondent moved for directed verdict. A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See, Jorgensen v. Heinz, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing on a motion for directed verdict, a trial court must view evidence in the light most favorable to the party against whom the motion is directed, and every reasonable inference drawn from the evidence presented is to be considered in the light most favorable to that party. Pulliam v. Dreiling, 839 P.2d 521 (Colo. App. 1992).

Respondent argued that Complainant had failed to demonstrate that Respondent had violated the personnel rules governing disability leave and administrative terminations for exhaustion of leave. Specifically, it contended that under Directors Procedures P5-10 and P-23, disability leave is unpaid, and is to continue for no longer than six months. Complainant argued that she was entitled to 22 months of short term disability leave, since that is the duration of the PERA leave benefit. For the reasons set forth below in the Discussion section, Complainant=s argument was rejected on the basis of the language of P 5-23. Therefore, the motion for directed verdict was granted.

STIPULATED FACTS

1. Complainant commenced her employment as a Micrographic Equipment Operator II for the Department of Lottery in February 1990.

2. On June 23, 1999 Complainant requested a temporary leave of absence as a result of a medical condition.

3. Complainant=s last day of work was June 24, 1999.

4. On January 4, 2000 Complainant was administratively terminated effective December 31, 1999 for having exhausted all available leave.

FINDINGS OF FACT

1. Complainant did not return to work after June 25, 1999.

2. As of the date of the hearing, Complainant was unable to return to work.

3. Complainant requested short term disability in a timely manner.

4. Complainant was given Family Medical Leave Act (AFMLA≅) leave in accordance with that Act. She received 520 hours, or thirteen weeks, of unpaid job protection, which expired on September 29, 1999.

5. Complainant was eligible for PERA disability benefits. Under the PERA Disability Program, Abeginning January 1, 1999, PERA will provide vested members with a two-tier Disability Program. One tier is short-term disability (STD) insurance provided by an insurance company and the other tier is a PERA disability retirement benefit.≅

6. Under the PERA disability benefit program, the short-term disability benefits can last up to 22 months.

7. The State of Colorado also provides its own short term disability program to all classified employees, including those not yet Avested≅ in the PERA program. This will be referred to as AColorado STD.≅

8. Respondent commenced payment of Colorado STD benefit payments to Complainant thirty days after her departure from work, on July 24, 1999. This 30-day delay is the standard waiting period for commencement of Colorado STD benefit payments.

9. Complainant=s Colorado STD benefit payments continued through December 20, 1999.

10. Once Complainant=s Colorado STD payments had been exhausted, the PERA short term disability payments commenced. They continue to this day, and are

expected to be paid out for a total of 22 months.[1]

11. Complainant exhausted all sick and annual leave in July 1999.

12. Complainant never requested an accommodation of any type.

13. Director=s Procedure P-5-10 states in pertinent part:

> **AIf an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. . . No employee may be administratively discharged if FML and/or short-term disability leave (includes the 30-day waiting period) apply and/or if the employee is a qualified individual with a disability who can be reasonably accommodated without undue hardship.≅**

14. Director=s Procedure P-5-23 states:

> **AA. <u>Short-term disability (STD) leave</u> is a type of unpaid leave of up to six months while either state or PERA STD benefit payments are being made. To be eligible for this leave, employees must have one year of service and an application for the STD benefit must be submitted within 30 days of the beginning of the absence or at least 30 days prior to the exhaustion of all accrued sick leave. The employee must also notify the agency at the same time that a benefit application is submitted.≅ (Emphasis in original)**

DISCUSSION

In this appeal of an administrative action, the Complainant bears the burden of proof to demonstrate by preponderant evidence that the Respondent=s actions were arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. (1999); <u>Department of Institutions v. Kinchen</u>, 886 P.2d 700 (Colo. 1994). The administrative

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[1] **For reasons undisclosed by the record, once the PERA short term disability policy was activated, it reimbursed the state for a large portion of the Colorado STD benefits already paid to Complainant. The same insurance company, Standard Insurance, is the carrier for both policies.**

law judge, as the trier of fact, must determine whether the burden of proof has been met. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

Complainant asserts that since she was still being paid under the PERA short-term disability policy at the time she was terminated, the termination violated P-5-10, which prohibits administrative discharges "if FML and/or short-term disability leave . . . apply." However, this interpretation of the rule fails to acknowledge that P-5-23 defines short-term disability leave as unpaid leave for no longer than six months.

P-5-23 is essentially a job protection rule. It provides that anyone who qualifies may take up to six months of unpaid leave for a short-term disability, and still have a right to have his or her job back at the end of that six-month period.

P-5-23 on its face provides "unpaid leave." Nothing in the rule requires that the duration of disability leave is equal to the duration of receipt of disability benefits. Complainant appears to confuse disability leave with disability payments. They are not one and the same.

Complainant's disability payments continue to this day: this fact does not render her administrative discharge after six months a violation of P-5-10. P-5-23 clearly limits the duration of job protection to six months. The record is uncontested that Complainant received six months of job protection, from June 24 through December 31, 1999. At that time, she had exhausted all available leave. Her administrative discharge was therefore not in violation of the pertinent procedures.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

This case is dismissed with prejudice.

DATED this _____ day of April, 2000, at

_____
Mary S. McClatchey

Denver, Colorado.

Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Linda Cage
1282 Avenida Del Oro
Pueblo West, Colorado 81007

Cristina Valencia
Department of Law
1525 Sherman Street, 5th Floor
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